

Canada Lynx
1/04

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, et al., :
:
Plaintiffs, :
:
v. : Civil Action No. 00-2996 (GK)
:
GAIL NORTON, et al., :
:
Defendants. :

MEMORANDUM OPINION

Plaintiffs have filed a Motion to Enforce and/or Modify the Court's Order of December 26, 2002. Upon consideration of the Motion, the Opposition, the Reply, the January 12, 2004 Motions Hearing, and the entire record in this case, the Court concludes that the Motion shall be **granted in part and denied in part.**

I. PROCEDURAL BACKGROUND

For more than eleven years, conservation organizations have labored to obtain protection for the Canada Lynx under the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1531, et seq. In 1982, the Fish and Wildlife Service ("FWS" or "Service") of the Department of Interior formally identified the Canada Lynx as a potential "candidate" for listing as either an "endangered" or "threatened" species under the Act. 16 U.S.C. § 1533. Despite that identification, during the next 10 years, the Service "took no formal steps to make a decision on listing." Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 674-75 (D.D.C. 1997) ("Lynx I").

Thereafter, various conservation groups, including some of the Plaintiffs in this lawsuit, filed formal petitions with the FWS requesting that the Agency list the Lynx in the contiguous United States.

After substantial study, on October 6, 1994, Region 6 of the FWS (which comprises a significant portion of the Lynx historic range) submitted its proposal to the Acting Director of FWS to list the segment of the Lynx population in the Northwest and Northern Rockies as threatened, and to list a different segment of the Lynx population in the Northeast, Great Lakes and Southern Rockies as endangered. Biologists from all FWS regions but one supported the Region 6 proposal which was accompanied by an extensive, 50-page analysis of the Lynx's history and current status. Id. at 676. On October 20, 1994, the recommendation of Region 6 was summarily rejected in a five-page memo from the Acting Director.

The Lynx I Plaintiffs subsequently challenged the Acting Director's rejection and, on March 27, 1997, the Court granted their Motion for Summary Judgment. Id. at 679.

Following that ruling on May 27, 1997, FWS published a "12-month Finding" on the petition to list the Lynx. 62 Fed. Reg. 28653-57.¹ Despite its finding that the Lynx warranted listing on four of the five ESA statutory listing factors, FWS refused to

¹ For a detailed discussion of the statutory framework of the Endangered Species Act, see Defenders of Wildlife v. Norton, 239 F. Supp.2d 9, 12-13 (D.D.C. 2002) ("Lynx III").

initiate a rulemaking process. Noting that the "immediate issuance of a proposed rule was warranted," FWS still concluded that such action was "precluded" by the Service's need to work on other species of even "higher priority" than the Lynx and that the Service would proceed with the listing at some unspecified future time. Id. at 28657.

In September 1997, the conservation groups once again filed a lawsuit challenging the Service's "warranted but precluded" determination. See Defenders of Wildlife v. Babbitt, No. 1:97-CV-02122 (GK) ("Lynx II"). Three months later, the Court issued an Order stating that "defendants' own 12-month finding makes clear" that "total extinction of the Lynx population is a distinct possibility," and that "the government's failure to have even raised the possibility of a preclusion finding--with its concomitant substantial delay--is very troubling and raises serious questions about the degree to which the Government has been fully candid and forthcoming with the Court." Lynx II, December 22, 1997 Order at 2, 3.

Subsequently, the Lynx II parties reached an agreement, and the government entered into a Court-ordered stipulation requiring FWS to publish in the Federal Register a proposed rule to list the Lynx within the contiguous U.S. Id., February 12, 1998 Settlement and Stipulation of Dismissal at 3.

On July 8, 1998, FWS published a proposed rule to list as "threatened" the "contiguous United States distinct population segment ["DPS"] of Canada Lynx." 63 Fed. Reg. 36994. However, FWS refused to propose the designation of any "critical habitat" for Lynx, despite the ESA's requirement that such habitat be designated "to the maximum extent prudent and determinable" at the time of listing. 16 U.S.C. § 1533(a)(3)(A).

On March 24, 2000, the Service published its Final Rule, listing as "threatened" the contiguous United States DPS of the Lynx. 65 Fed. Reg. 16052. With respect to the designation of critical habitat required by the ESA, the Service changed its position. Despite conceding that a critical habitat designation for the Lynx would be "prudent," FWS announced that "deferral of the critical habitat designation for Canada Lynx allows us to concentrate our limited resources on higher priority critical habitats." Id. at 10683. The Service promised to "develop a proposal to designate critical habitat as soon as feasible, considering our workplace priorities." Id.

Once again, the Plaintiff conservation groups filed another lawsuit ("Lynx III," the present action), challenging the Final Rule listing the Lynx as "threatened" rather than "endangered," and challenging the Service's refusal to designate the species' critical habitat as required by the ESA. On December 26, 2002, the Court granted Plaintiffs' Motion for Summary Judgment in this case

and ordered Defendants "to undertake prompt rulemaking in order to designate critical habitat for the Lynx" as statutorily mandated under the ESA. Defenders of Wildlife v. Norton, 239 F. Supp.2d at 26. In order to monitor the Defendants' progress in completing the long delayed rulemaking, and without objection from the Defendants, the Court also ordered that Defendants submit reports every sixty days on the status of the Lynx critical habitat designation. Id.

In addition, at the request of Plaintiffs and over the vigorous objection of Defendants, the Court enjoined the Service from issuing any written concurrences under § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), that actions proposed by any federal agency "are not likely to adversely affect" the Canada Lynx. Id. at 23-26.

In response to the Court's Order of December 26, 2002, FWS has timely filed six status reports with the Court, indicating in each and every one that it has performed no work whatsoever on the critical habitat listing for the Canada Lynx, and that it has no intention of commencing work on that listing before October 1, 2004 or January 1, 2005.²

Defendants have also appealed from that portion of the Court's decision concluding that the Service's determination that

² Tr. p. 77 of the November 13, 2002 Summary Judgment Motions Hearing. The Service now contends, in this round of briefing, that it plans to start work on the Lynx listing by October 1, 2004.

"collectively, the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the range of the DPS" was arbitrary and capricious, as well as from the Court's injunction against the issuance of any written concurrences on "not likely to adversely affect" determinations pursuant to 16 U.S.C. § 1536(a)(2). They have not appealed from those portions of the Order requiring them to "undertake prompt rulemaking" and to submit 60-day status reports.

II. THE EXPEDITED MOTION TO ENFORCE AND/OR MODIFY

In an effort to achieve some progress in this protracted saga, Plaintiffs have requested further relief. First, Plaintiffs ask the Court to impose a specific rulemaking schedule in order to force the Service to start work on a process that everyone agrees will be lengthy and complex. Second, Plaintiffs ask the Court to terminate its injunction against the Service's concurrence in "not likely to adversely affect" determinations. Third, Plaintiffs ask the Court to issue a formal Order to Show Cause why the Defendants should not be held in contempt for failing to "undertake prompt rulemaking in order to designate critical habitat for the Lynx."

Because this case is on appeal, there is a substantial question regarding the Court's jurisdiction. In order to avoid any confusion on that issue, the Court wishes to make clear that this Opinion reflects the decision and order it would issue, and the reasons therefore, pertaining to modification of its December 26,

2002 Order, if the Court of Appeals remands for that purpose. See Hoai v. Vo, 935 F.2d 308, 312 (D.C. Cir. 1991); La Rouche v. U.S. Dept. of Treasury, 112 F. Supp.2d 48, 52 (D.D.C. 2000).

A. Imposition of a Date-Specific Rulemaking Schedule

During litigation of the cross-motions for summary judgment in 2002, the Service informed the Court in detail about its existing obligations to complete critical habitat listings. Some of those existing obligations related to listings which the Service had already started on its own, and some related to the many listings which had been ordered by different United States District Courts throughout the country. Citing to its many existing obligations and its existing budgetary constraints, the Service represented to the Court that it doubted it could commence work on the Canada Lynx listing before January 1, 2005, and that it planned to issue a proposed rule designating critical habitat of the Canada Lynx on November 1, 2005 and a final rule by November 1, 2006. Accepting for the sake of argument that the Service would meet this schedule, it is clear that FWS would be in open, notorious and flagrant violation for more than six and one-half years of its ESA statutory mandate to list the critical habitat of any endangered or threatened species.

In an effort to accommodate the many existing obligations set forth in great detail by the Service, the Court's December 26, 2002 Order adopted language, previously sanctioned by the Court of

Appeals, which would convey to the Service the urgency with which the Court expected this issue to be addressed, but which would also allow the Service sufficient flexibility to devote the necessary time and resources to complete a comprehensive rulemaking that would adequately assess the complex and difficult issues involved.³

By allowing this modicum of flexibility to the Service, the Court hoped to avoid situations, which have occurred in certain instances, where Court-ordered deadlines were so onerous that an agency was unable to complete an acceptable rulemaking, resulting in the setting aside of agency rules as being arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2) (A).

While the December 26, 2002 Order sought to accommodate the Service's existing obligations, it is simply ludicrous for FWS to seriously argue, as it did in its opposition to the present Motion and at oral argument, that the Court had thereby "implicitly" accepted its time table for not even beginning work on the Canada Lynx critical habitat designation until 2004 or 2005. Moreover, it is similarly disingenuous for the Service to argue that the Court's failure to order a date-specific rulemaking schedule for a critical

³ See In re Blue Water Network, 234 F.3d 1305, 1316 (D.C. Cir. 2000), where the Court of Appeals noted with approval that the direction to undertake "prompt rulemaking" is a remedy that had been ordered by other courts for agency violations of mandatory statutory obligations.

habitat designation reflected the Court's acceptance of Defendants' proposed time table.

The fact of the matter is that the Service has done absolutely nothing to comply with the Court's Order to "undertake a prompt rulemaking" (emphasis added). Obviously, there would have been no need for the Court to order "prompt" rulemaking if it had meant to defer to the distant time frames proposed by the Service. Nor would there have been any reason for the Court to order status reports every 60 days if it had meant to accept the Service's long delayed schedule. To the contrary, the Court's intention clearly was that FWS should commence a good faith effort to list the Lynx promptly, i.e., as soon as reasonably possible, and should also keep the Court apprised on a regular 60-day basis of its progress.

Even more problematic than the Service's absolute non-compliance with the Court's Order for a prompt rulemaking, is the Service's admission that it has devoted resources to critical habitat listings required by court orders entered after this Court's Order of December 26, 2002.⁴ Not only did FWS never say or even suggest that it would take other listings ahead of this Court's listing Order, but it represented to this Court and to

⁴ In its Fifth Status Report, FWS relies on the existence of court orders for critical habitat designations in other cases entered six and nine months subsequent to this Court's December 26, 2002 Order to justify its lack of resources to meet its obligations in this case.

other courts that it would undertake court-ordered critical habitat listings in the order in which those court orders were entered.

In short, the Service has flagrantly violated both the ESA and this Court's Order to "undertake prompt rulemaking." In addition, it has been disingenuous, bordering on dishonest, with this Court about the order in which it was going to handle its obligations under the ESA.

Finally, the Court's Order of December 26, 2002, was also premised on the representations made by the Service about its then existing budgetary situation. In fact, that budgetary situation has improved since December 26, 2002. On November 10, 2003, the President signed the 2004 Interior and Related Agencies Appropriations Bill, P.L. No. 108-108, providing for a significant increase in the Service's Fiscal Year 2004 appropriations for listings and critical habitat designations.⁵ Nearly \$9 million was allocated for critical habitat designations, the highest amount ever appropriated for this purpose, and an increase of over \$3 million from the Fiscal Year 2003 budget request. Not a penny of that increase was allocated to begin work on the critical habitat listing for the Canada Lynx, nor was Congress informed in the

⁵ The Service seemed to argue at the motions hearing that the additional \$3 million was simply reallocated or reprogrammed from other existing funds. Whether that is true or not, the bottom line is that the Fish and Wildlife Service received an additional \$3 million for the specific purpose of completing critical habitat listings.

Service's budgetary submission of the need to undertake the Lynx designation.

In view of this entire scenario, and the failure and/or inability of the Service to be straightforward with this Court, the Court concludes that the only way to ensure that FWS carry out its statutory mandate is to impose a time-specific rulemaking schedule. Plaintiffs recognize and are extremely realistic about the fact that this complex rulemaking will take a substantial period of time, that no one knows how long it will take, and that it will certainly take more than the 13 months allocated in the Service's time table.⁶

Thus, it is essential that the Service commence work on the Lynx listing as soon as possible. Plaintiffs have requested that the Service be ordered to commence work within 14 days. That short a period of time is too draconian.⁷ Instead, if this case is remanded, the Court would require FWS to commence work on the Canada Lynx critical habitat listing by March 15, 2004, to continue submitting 60-day progress reports, to issue a proposed rule by November 1, 2005 and to issue a final rule by November 1, 2006.

⁶ At the November 13, 2002 motions hearing, the Service conceded that Plaintiffs' estimate of two years "might not be out of the ballpark." Tr. at 73.

⁷ Indeed, Plaintiffs' counsel commendably admitted at oral argument that a 60-day deadline would be "realistic."

B. Lifting the Injunction

In its December 26, 2002 Order, the Court enjoined FWS from concurring in any ESA Section 7 "not likely to adversely affect" determinations by other federal agencies until it completed its critical habitat designation for the Lynx. After determining that it had the authority to award the relief requested, the Court concluded that such relief was "essential to fully and effectively carry out the will of Congress." 239 F. Supp.2d at 23. Noting that FWS was "in patent violation of unequivocal statutory mandates" and that the Service claimed that it could not remedy this statutory violation for an additional four years, the Court concluded that unless Plaintiffs obtained the injunctive relief sought, "they will be without any meaningful remedy. . . . Most significantly, the Lynx, which the ESA was designed to protect, would continue to suffer the adverse effects of the Service's failure to protect its habitat. . . . Plaintiffs' requested relief would in part, ameliorate these negative consequences for the species." 239 F. Supp.2d at 23-24. As noted earlier, the Service vigorously objected to this injunctive relief.

Plaintiffs have now concluded that the injunctive relief they originally sought, and obtained, no longer provides the required protection that they had hoped for. The injunctive relief compelled the Service to prepare Biological Opinions on all formal actions that might affect the Canada Lynx. Plaintiffs had

anticipated that the obligation to prepare Biological Opinions until completion of its critical habitat designation would serve as an incentive to motivate the Service to complete the designation rulemaking as quickly as possible. Plaintiffs concede that the injunction order has not had the intended effect of motivating Defendants to carry out their mandatory statutory duty. In short, while Plaintiffs' requested relief was perfectly reasonable and appropriate at the time it was asked for, the injunction has not been effective.

There is no reason to maintain an injunction which is no longer serving its intended purpose. For reasons that are totally incomprehensible to this Court, the Service now opposes the lifting of the injunction, even though it fought against its imposition a year ago. Despite questioning at oral argument, the Service could not provide any coherent reason for objecting to the termination of an injunction, which it strongly opposed previously. Consequently, Plaintiffs' request to terminate an injunction which has lost its ameliorative purpose would be **granted** if this case is remanded.

C. Issuance of Order to Show Cause Why Defendants Should Not Be Held in Contempt

Plaintiffs have also requested that the Court issue an Order to Show Cause why Defendants should not be held in contempt of Court. As already discussed, it is perfectly clear that the Defendants have openly and willfully ignored the Court's order to undertake a prompt rulemaking on the designation of critical

habitat for the Canada Lynx. However, in the Court's judgment it would not be a productive use of either judicial resources, or the litigants' resources, to undertake a complex, drawn out contempt proceeding that might further divert FWS from carrying out its statutory mandate to protect endangered and threatened species. See for example, Cobell, et al. v. Norton, 2003 U.S. App. LEXIS 18724 (D.C. Cir. September 9, 2003). Consequently, in the exercise of its discretion, the Court would **deny** Plaintiffs' request to issue an Order to Show Cause Why Defendants should not be held in contempt, if this case is remanded.

January 15, 2004

_____/s/_____
Gladys Kessler
United States District Judge

**Copies via ECF to
all counsel of record**